SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 490

LENOIR FINANCE COMPANY

Appellant,

v.

JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, (W. A. JOHNSON, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, SUBSTITUTED DEFENDANT)

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Lenoir Finance Company, a small North Carolina Corporation, appellant in the above case, having appealed to the Supreme Court of the United States from the final judgment rendered by the Supreme Court of the State of North Carolina, submits the jurisdictional statement as required by paragraph two of Rule 13, as follows:

(a) OPINIONS BELOW

The judgment of the North Carolina Superior Court (not reported in any official report) will be found at page 16 of the

printed record as appearing in the Office of the Clerk of Supreme Court of the State of North Carolina, a copy of which appears in the record, as certified to this Court. The opinion of the Supreme Court of the State of North Carolina is reported in 254 N. C. 129. Order dismissing the petition to rehear is in the record of the case in the Supreme Court. Copies of said judgment opinion and order are set out in the appendix to this jurisdictional statement and are designated as "Appendix 1, Appendix 1-A, and Appendix 1-B."

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a civil action instituted for the recovery of taxes paid to the State of North Carolina, under protest, by the plaintiff.

The action was originally instituted in the Superior Court of Wake County against the Commissioner of Revenue of the State to test the validity of the statute under which said tax was levied and was brought pursuant to the authority contained in Section 105-267 of the General Statutes of the State of North Carolina. All preliminary conditions were complied with, and there is no procedural question involved.

(ii) The judgment of the Supreme Court of the State of North Carolina from which this appeal is taken, was entered on March 1, 1961. Thereafter, a petition for re-hearing was duly filed on or about the 6th day of April 1961, and said petition was denied by an order entered by the Court on July 7, 1961. Notice of appeal to this Court was duly served on the Appellee and was duly filed in the Office of the Clerk of the Supreme Court of the State of North Carolina on August 24, 1961.

(iii) Jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1257 (2), which statutory provision it is believed confers on this Court jurisdiction of the appeal. Said

statutory section provides that "final judgments or decrees" rendered by the highest Court of the State in which a decision could be had may be reviewed by the Supreme Court, as follows:

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(iv) Cases believed to sustain the jurisdiction of this Court are as follows:

Central Greyhound Lines, Inc. vs. Mealey, 334 U.S. 653
Schuylkill Trust Co. vs. Pennsylvania, 296 U.S. 113
International Harvester Co. vs. Missouri, 234 U.S. 199
Concordia Fire Ins. Co. vs. Illinois 292 U.S. 535
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Cumberland Coal Co. vs. Bd. of Revision 284 U.S. 26
Wheeling Steel Corp. vs. Glander 337 U.S. 562
Hartford Steam Boiler Inspection & Ins. vs. Harrison
301 U.S. 459

"The 14th Amendment to the Constitution of the United States, among other things, provides that no State shall deny 'to any person within its jurisdiction the equal protection of the law' As Judge Cooley stated in his excellent works on 'The Law of Taxation', 4th Ed. Volume 1, Section 249: 'There is no question as to the applicability of this provision to taxation. The provision imposes a limitation upon all the powers of the State which can touch the individual or his property, including among them, that of taxation'."

The text is supported by numerous decisions of the State and Federal Courts. (See 131 A.L.R. 343)

(c) STATUTE INVOLVED:

(a) The Statute of the State of North Carolina involved is G. S. 105-83, the exact text of which is as follows:

"105-83 Installment paper dealers.—(a) Every person, firm or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business of dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the Courts of this State until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or National banking laws.

(e) Counties, cities and towns shall not levy any license tax

on the business taxed under this section (1939, c. 158, s. 148; 1957, c. 1340, c. 2)."

This will be found in General Statutes of the State of North Carolina, Volume 2C page 580.

(d) THE QUESTIONS PRESENTED BY THIS APPEAL ARE AS FOLLOWS:

1. Is section 105-83 of the General Statutes of the State of North Carolina unlawfully discriminatory and unconstitutional, in that it violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does this Statute violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the Appellant of its property other than by the law of the land and without due process?

3. Is it lawful for a State to levy a tax for engaging in a special type of business and exempt part of the class engaged in the business, even though admittedly all of those who are taxed and who are not taxed are doing identically the same business and on the same basis; and does not this method of taxation violate the Fourteenth Amendment to the Constitution of the United States?

(e) STATEMENT OF CASE

This is a civil action instituted by the plaintiff to recover $1,911.36 representing taxes paid under protest for the quarter ending October 1, 1959, which were levied, assessed and collected under sub-section (b), Section 105-83 of the General Statutes of the State of North Carolina, which is quoted above, with interest from November 6, 1959. Suit was instituted pursuant to the provisions of Section 105-267 of the General Statutes. It is alleged that the Statute under which this tax was levied is unlawfully discriminatory and unconstitutional and that for this reason the plaintiff is entitled to recover. The case was tried on an Agreed Statement of Facts and perhaps the facts material to the consideration of the questions presented

can best be stated by quoting from said Agreed Statement of Facts. Paragraphs three to eleven inclusive are as follows:

"3. Many of the State and National banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank installment paper dealers, and are doing a substantial volume of the installment paper dealer business in North Carolina.

4. The Plaintiff, Lenoir Finance Company, an Installment Paper Dealer and Automobile Finance Company, pays to the State of North Carolina the following taxes: (1) Franchise Tax; (2) License Tax; (3) Intangible Tax; (4) Sales and Use Tax; and (5) 6% Income Tax. It also pays both County and City ad valorem taxes on real and tangible personal property. In addition to the foregoing taxes levied against the Plaintiff by the State of North Carolina and its political sub-divisions, the plaintiff is required, pursuant to the provisions of sub-section (b) of Section 105-83 of the General Statutes of North Carolina, to pay quarterly as an additional tax the sum of .275 of 1% of the total face value of the installment paper, notes, bonds, contracts, evidences of debt and/or other securities bought and/or discounted by it within the preceding three-months period

5. The Plaintiff, as required by sub-section (b) of Section 105-83 of the General Statutes of North Carolina and relating to the period in suit, soon after the first day of October, 1959, submitted to the Defendant, on forms duly approved by the Defendant, a full, complete and accurate report of the total face value of the installment paper, notes, bonds, contracts, evidences of debt and/or other securities described in said section which had been bought or discounted within the three-months period ending September 30, 1959, and at that time paid the tax thereon as provided for in said Section. The amount of the tax so paid by the Plaintiff on each of its offices was as follows: Lenoir, North Carolina, Office $470.94; Statesville, North Carolina, Office $205.13; Hendersonville, North Carolina, Office $162.03; Elkin, North Carolina, Office $764.84; Forest City, North Carolina, Office $308.42; or a total amount

of tax on its five offices of $1,911.36. The plaintiff in apt time paid these taxes under protest, and in addition to the taxes required by sub-section (b) of North Carolina General Statutes, 105-83 the Plaintiff paid to the Defendant, Commissioner of Revenue, for the year 1959, pursuant to the provisions of Section (a) of North Carolina General Statutes 105-83 the sum of $100.00 for each of the five offices of Lenoir Finance Company, or a total of $500.00, as license fees.

6. After its payment under protest of the aforesaid taxes the Plaintiff filed, on November 6, 1959, a date within 30 days after the date of payment under protest, a written claim for refund and demand for the repayment by the Defendant to the Plaintiff of said taxes. The Defendant denied said claim of the Plaintiff in writing on November 9, 1959, and more than 90 days have elapsed since the date the Plaintiff delivered to the Defendant the above mentioned claim for refund of taxes and prior to institution of this action.

7. G. S. 105-228.12 levies on every bank located and doing business in this State, including National Banking Associations, an excise tax of 4½% of its entire net income. Under G. S. 105-228.13, it is provided that this excise tax is in lieu of the intangible personal property tax, the franchise tax, the income tax, taxes levied upon the shares of stock of banks and taxes levied upon tangible personal property by local taxing jurisdictions. Other than County and City ad valorem taxes on real property this annual excise or income tax is the only tax levied upon State or National Banks by the State of North Carolina or by its political subdivisions. This method of taxing State banks was adopted in 1957. State banks pay fees to the Commissioner of Banks in accordance with G. S. 53-122 (1959 Cumulative Supplement).

8. The sole authority for the State to tax National Banks is conferred by Title 12 USCA, Sec. 548 and that section provides four methods by which States may tax National Banks. Section 1 (a) thereof provides that the imposition by the State of any one of the four forms of taxation shall be in lieu of all others, except the taxation of individual stockholders on dividends from National Banks, provided dividends from State Banks are similarly taxed. Subsection 3 of Section 548, supra, however, allows the State to tax the real property of National

Banks according to its value. By virtue of the tax imposed by North Carolina General Statutes 105-228.12, North Carolina has adopted Method No. 4 for the taxation of National Banks, that is, a tax levied upon and measured by the entire net income of the Banks, designated an Excise Tax. Thus, the State is precluded from any other taxation of National Banks by the express language of Title 12 USCA, Section 548. Since 1957, therefore, both State and National Banks have been taxed in North Carolina by the same method.

9. The tax imposed by North Carolina General Statutes 105-83 on installment paper dealers is not imposed upon State or National banks, though many of them are also installment paper dealers in addition to their other activities, and by virtue of the provisions of Title 12 USCA, Section 548, such a tax may not be imposed upon National banks.

10. A substantial number of State and National Banks doing business in North Carolina engage in the business of installment paper dealers as defined in G. S. 105-83, in addition to their other activities, as do the plaintiff and other non-bank installment paper dealers. All such installment paper dealers, banks, and non-banks engage in substantially identical operations with respect to their installment paper business, which do not differ in any material respect, either as to the methods and mechanics of acquiring installment paper, or as to the business arrangements with the automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise. In general and in detail, the conduct of installment paper dealer business in North Carolina is and was at all times mentioned in the Complaint the same in all substantial and material respects, as engaged in and carried on by State and National banks and the plaintiff and other non-bank installment paper dealers.

11. In a substantial number of banks this installment paper dealer business is handled by a separate department of the bank commonly known as an Installment Loan Department or as a Time Payment Department, often in an office or building entirely separate from the main bank building, and the records, bookkeeping and management personnel in such department devote their full time exclusively to the contracting for, acquisi-

tion, of, collecting of, servicing of this installment paper and to other work incident to this phase of the bank's operations and the same is substantially identical to the operations of non-bank installment paper dealers. Many of the banks maintaining installment Loan Departments or Time Payment Departments keep these departments open beyond regular banking hours to conform to hours maintained by the plaintiff and other non-bank installment paper dealers."

The Federal questions sought to be reviewed were first raised in the complaint filed in the Superior Court (Court of first instance). In paragraph 10 of the complaint (page 6 of the record), it is alleged that the Statute involved "is invalid for the reason that it violates Article 5, Section 3 of the North Carolina Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that the same further violates Article 1, Section 7, of the North Carolina Constitution, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its property other than by the law of the land and without due process of law."

These questions were argued at the time of the trial in the Superior Court and again on page 9 of the plaintiff's brief filed in the Supreme Court of North Carolina, at which point in the brief the plaintiff's position was stated, as follows:

"It is the plaintiff's position that it violates Article 5 Section 3 of the Constitution of North Carolina, which requires that the power of taxation shall be exercised in a *just* and *equitable* manner; that it violates Article 1, Section 7, which denies to any person or set of persons exclusive or separate emoluments of privileges; and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff of its property, without due process of law and is violative of the equal protection clause of said Amendment. *It violates every principle of uniformity in taxation.*"

They were again raised in the Petition to rehear.

The way in which these questions were passed upon by the State Supreme Court will be found in the 2nd paragraph of the opinion, which is at the bottom of page 31 and reads as follows:

"A tax statute which suffices to meet the rule of uniformity required by our Constitution, likewise conforms to the requirements of the Fourteenth Amendment of the United States Constitution."

(f) GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

We are confronted with a unique piece of legislation; one that but one other State—Mississippi—has ever attempted (See Editor's comment to this effect in Annot. 140 A.L.R. 1037 (1942)). And Mississippi recognizing the injustice about to be done, provided that the tax levied was in lieu of all other privilege taxes upon such business and that the amounts paid by the taxpayer in any calendar year, shall be credited upon such income tax as may be due by the taxpayer for such calendar year, it being the express purpose and effect of the Statute that whichever of the taxes is greater in amount shall be paid by the taxpayer. How different this is from the Statute in question in our State!

The State Court, by its opinion upholding the Statute involved in this case, has, in our opinion, made a far-reaching decision which inadvertently, but seriously impairs the fundamental Constitutional principle of uniformity in taxation, guaranteed by the Fourteenth Amendment.

At the outset, we call to the Court's attention the definition of an installment paper dealer as contained in North Carolina General Statutes, Section 105-83:

"Every person, firm or corporation, foreign or domestic, engaged in the business of dealing in, buying and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is secured or taken upon personal property located in this State to secure the payment of such obligation***"

It is emphasized that this is the class selected by the General Assembly to be taxed. It is clear that the class selected is all inclusive as to all (banks or otherwise) engaged in the business defined. However, sub-section (d) of said section provides that "this section shall not apply to corporations organized under the State or National banking laws." In North Carolina, the special powers of banking corporations conferred by General Statute, section 53-43 are "In addition to the powers conferred by law upon private corporations . . .". State banks, therefore, organized in North Carolina have all of the powers conferred by law upon private corporations and may exercise these powers by engaging in a multitude of businesses competitive with other private corporations. There is no legal obstacle to prevent a bank engaging in any kind of business operated by private corporations, and as is well known, many banks today are engaged in and own and operate many business enterprises in no way designated or considered as banking business.

It is common knowledge that banks compete directly with realtors, insurance agencies, travel agencies, restaurants and numerous other types of businesses, not in any way connected with the banking business as such, or as defined by statute. And where there is a special privilege tax levied, for engaging in these businesses, banks pay, as do others so engaged in the business which is taxed. Banks, under North Carolina law, are authorized to and do, in fact, exercise many powers beyond the scope of those usually and customarily associated with the banking business, and in doing so, they directly compete with a large segment of the business community. If they are

exempted from the payment of special license or privilege taxes imposed on others for engaging in these activities, would those who are taxed for engaging in these same businesses be accorded equal protection of the law, as contemplated by the Fourteenth Amendment? We think not. The power to tax is the power to destroy. Likewise, the power to exempt from uniformity of taxation (which the State Court's decision sanctions and approves) is the absolute power to destroy and stifle competition.

It is respectfully submitted that for these reasons the Federal questions involved in this decision are substantial and should be reviewed by this Court.

It is admitted and stipulated in the "Agreed Statement of Facts" as follows:

"Many of the State and National banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank installment paper dealers and are doing a substantial volume of the installment paper dealer business in North Carolina."

The thing classified, the subject or object of taxation, is all Firms engaging in the business of an installment paper dealer, and for doing this business the statute imposes a license tax of $100.00 and an additional tax of 27½c on every one hundred dollars face value of installment paper purchased, as defined by the statute.

Installment paper dealer operations owned and controlled by banks are not a part of the banking operations, but, as stipulated in the Agreed Statement of Facts, they are, "*In addition to their other activities.*" As installment paper dealers they are "in substantial competition with the plaintiff and other non-bank installment paper dealers and are doing a substantial volume of the installment paper dealer business in North

Carolina." They operate, "often in an office or building separate from the main bank building, and the records, bookkeeping and management personnel . . . devote their full time exclusively to the contracting for, acquisition of, collecting of, servicing of this installment paper . . . and the same is substantially identical to the operations of non-bank installment paper dealers." (See paragraph 11 of the Agreed Statement of Facts; supra). These agencies are open beyond regular banking hours to conform to the hours maintained by the plaintiff and other non-bank installment paper dealers. In other words, *it is an all day (until five o'clock) operation entirely separate from the banking business* and "does not differ in any material respect, either as to the method and mechanics of acquiring installment paper, or as to the business arrangements with automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise." from the business of non-bank installment paper dealers. (See paragraph 10 of the Agreed Statement of Facts; supra).

We readily agree that the General Assembly has the power to classify subjects of taxation and that this carries with it the broad discretion to select the subjects it will tax. However, once a subject is selected and the tax imposed, it must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges. For, as so well stated in *Youngstown Tube & Steel*, 91 Ohio(App. 431, 108 N. E. 2d 571, "a classification in a tax statute to be valid must be a classification of the subject of taxation or property taxed and not a classification of taxpayers."

As what seems to be the basis for the State Court's decision, the Court states in the next to the last paragraph of the opinion:

"Not long after the business defined by statute as installment paper dealers became economically important, several States, recognizing the distinction between such a business and

the business of banking taxed them differently. Where such statutes were challenged as arbitrary classifications, the Courts upheld legislative action." (Citing cases)

We respectfully submit that none of the cases cited thereafter by the Court support this position. *Not one of the seven cases cited to sustain this position involves an installment paper dealer tax,* and all of the cases cited were decided before the business defined by statute as installment paper dealers became economically important or had even come into existence. (See pp. 7 of Appellant's petition for re-hearing for analysis of cases cited by State Court.) As a matter of fact, no other State has ever enacted a statute comparable to the one under attack.

Our State Supreme Court seems to have missed or ignored the real question involved in this case. Its opinion discusses the difference between banks and installment paper dealers, the authority of the General Assembly to classify subjects for taxation, and the fact that there are various types of lending agencies, all of which are classified differently. We have no quarrel with their reasoning on these subjects. The Court overlooked or failed to consider, however, the fact that as stipulated in the Agreed Statement of Facts, many banks are not only banks, but "in addition to their other activities," are also installment paper dealers, as defined in the Statute and, in doing so, it has, in effect, permitted a division of installment paper dealers into two classes, one taxed and the other not taxed, although both groups are engaged in identically the same business. It condones a very vicious and arbitrary discrimination among taxpayers of the same class, violates the equal protection clause of the Fourteenth Amendment and violates the general rule stated in 51 American Jurisprudence, page 238, which is as follows:

"Sect. 178—Equality within Class—The general principle that classifications may be made in tax legislation is subject to the qualification that there must be equality and uniformity within each class. In other words, a tax statute must operate

alike on all persons and property similarly situated or circumstanced, or of like kind and there can be no discrimination between taxable subjects which properly belong to the same class. While different rates of taxation may be applied to different taxable subjects, uniformity of taxation requires that all property or other taxable subjects of the same class be taxed by the same rate or measure. It has been variously said that a tax must fall impartially on all persons in similar circumstances, that the only rule of equality in respect to taxation is that the same means and methods shall be applied impartially to all constituents of each class, so that the law shall act equally and uniformly upon all persons in similar circumstances, and that all taxes must be uniform upon the same class of subjects."

Classification must always rest upon distinctions which bear a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U.S. 150; *accord*, Stebbins v. Riley, 268 U.S. 137; Southern Railway Co. vs. Green, 216 U.S. 400; Connolly v. Union Sewer Pipe Co., 184 U.S. 540. Classification must also rest on differences pertinent to the subject in respect of which classification is made. Power Mfg. Co. v. Saunders, 274 U.S. 490.

And in order for classification adopted by the State Legislature to be sustained, there must be SUBSTANTIAL DIFFERENCES between the occupations separately classified. Such differences need not be great as long as they are substantial and germane to the object. State Bd. of Tax Comrs. v. Jackson, 283 U.S. 527. However, we strongly contend and are supported in our contention by the "Agreed Statement of Facts" that when banks are engaged in the installment paper business, as defined by Statute, there is not such a *reasonable* and *substantial* difference between bank installment paper dealers and the exclusive installment paper dealers as to permit a valid difference in classification, under the Equal Protection Clause and the due

process clause of the Fourteenth Amendment and Article 5, Section 3 and Article 1, Section 7 of the N. C. Constitution. When classification is made in reference to installment paper dealers, as defined by G. S., Section 105-83 there is no pertinent or germane difference between bank installment paper dealers operating in this field and the exclusive dealers in installment paper on which to make a valid distinction for tax purposes. See Power Mfg. Co. v. Saunders, 274 U.S. 490.

The State Court, in its opinion on page 6, says:

"Legislatures have for many years grouped and classified those engaged in lending money based on the manner in which the business was conducted. Pawn brokers are nearly always put in a class distinct from other money lenders, and this classification has been upheld (citing cases). True, most of these cases deal with the exercise of the police power rather than the power to tax, but the principle involved is the same. Classification, to be valid, must rest on a genuine distinction."

It will be observed that the Court in effect admits that all of the cases sustaining its position, *deal with the exercise of the police power* and in effect it also admits that the case under consideration does not involve the exercise of the police power. It says, however, "but the principle involved is the same."

So far as we have been able to ascertain, no Court in this Country has ever before held that the principles involved in the exercise of the police power and in the exercise of the power to tax are the same. The exercise of the police power by legislative bodies is occasioned where the public interests demand regulation and control of a particular segment of the business world. On the other hand, the power to tax must be for revenue purposes alone. Taxes are levied to raise revenue to carry on the normal functions of government. It is true that fees or taxes are levied in the exercise of the police power, but it is equally true, that such fees and taxes cannot be levied for revenue purposes. It is also true, that there is an element of classification where the police power is exercised. *But the*

fundamental and major difference is that classification under the police power is not subject to the constitutional rule of uniformity as is classification under the taxing power. And while classification may rest on "genuine distinction," such distinction cannot override the constitutional requirement of uniformity where a taxing statute is involved. The Court sought to differentiate between banks and installment paper dealers, but it made no effort to distinguish between bank installment paper dealers and non-bank installment paper dealers. In this, we think the Court missed the point involved in this case. It is admitted in the agreed statement of facts that there is no real difference. Both admittedly are included in the statutory definition and bank installment paper dealers would pay the tax, but for the exemption section of the statute. There is only one class and there has been no effort on the part of any one to find a distinction and divide them into different classes. No question of classification is involved. It is a question of exemption from taxation of one part of a class and taxing the other.

No question concerning the small loan business or any other type of lending agency is involved and an installment paper dealer is not a lending agency. One who makes a direct installment loan is not classed as an installment paper dealer and there is no tax for making the loan. The tax is imposed only when installment paper is purchased from a third party. The statute in no way attempts to regulate this business. It is indeed an essential part of our modern national economy, and one in which those who are engaged, whether small domestic or large foreign corporations, are entitled to the protection guaranteed by the Fourteenth Amendment. There is not involved any taint of usury or other moral stigma of any kind whatsoever.

The Statute involved, therefore, cannot in any sense of the word be considered as an exercise of the police power. It is solely a revenue measure.

From the foregoing, we believe it will be clearly observed that the Federal Questions involved in this case are substantial.

THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION ARE AS FOLLOWS:

The plaintiff is only one of many dozen installment paper dealers operating in the State of North Carolina. Some are domestic corporations, some are foreign corporations, domesticated to do business in this State. All of these corporations pay all of the corporate taxes levied against corporations in North Carolina, including income tax, franchise tax, ad valorem tax on real and personal property, intangible tax, sales and use tax. In addition, they are required to pay a privilege tax of $100.00 levied under section (a) of the Statute involved and 27½c on the one hundred dollars of face value of all installment paper and notes purchased, as defined in said act. This is indeed a very burdensome, arbitrary and unjust tax. While the plaintiff is suing for only approximately $2,000.00 in this case, representing the tax paid by it during a three months period in 1959, the annual amount of this tax involved for this one small North Carolina company is approximately eight to ten thousand dollars per year. This, of course, is a test case and the amount involved each year for non-bank installment paper dealers is approximately $600,000.00 or more. While this segment of the industry is paying to North Carolina, in addition to all other taxes, this amount of tax each year, the other segment of the industry, (bank installment paper dealers) doing approximately 50% or more of the installment paper dealer business in this State, pays nothing for the privilege of doing so. In some instances there will be an installment paper dealer office on one corner and another either across the street on the opposite corner, or only a block or two away. The nature of their business is identical; their terms are the same; their methods of operations are the same; the public knows

both of them as installment paper dealers. Each buys approximately Ten Million Dollars worth of this installment paper each year;—one is taxed for the privilege of doing this amount of business, $27,500.00, in addition to all other taxes, and the other (a bank installment paper dealer) pays no tax for the privilege of making these purchases. A dealer purchasing fifty million dollars worth of this paper (and there are some, both bank installment paper dealers and non-bank installment paper dealers who purchase this amount) is required to pay $137,500.00, the amount of the tax always being dependent upon the amount of the paper purchased. The State Supreme Court, in fact, recognized that there is far more involved than the $2,000.00 which the plaintiff seeks to recover in this case, as will be observed on page 6 of the opinion where it says:

"We take judicial knowledge of the fact that there are many corporations engaged in this business. Some are financial giants and *national* in scope. Their shares are listed on various stock exchanges. Their resources run into hundreds of millions. They establish lines of credit and borrow from banks and insurance companies." (Emphasis added)

The Court failed to take "judicial notice" of the fact that many banks engaged as installment paper dealers are also financial giants whose resources run into hundreds of millions. Whether large or small, domestic or foreign, the appellant and all those similarly situated are entitled to the equal protection of the law and to be taxed in a "just and equitable manner," as required by the Fourteenth Amendment.

Further, this Court should be cognizant of the fact that, as the State Court has pointed out above, the act in question has a direct and pecuniary effect upon many foreign corporations and that the net result of the act is a highly inequitable discrimination against many foreign corporations that have domesticated in North Carolina to carry on their financial activities. This discrimination occurs because under the act in question state banks, which by law can only be domestic

corporations, are made a privileged class. While it is to be noted that sub-section (d) of the act also places national banks in this same privileged class, this is in fact surplus language and of no consequence. The sole authority for a state to tax national banks is conferred by Title 12 USCA, section 548, which provides four approved methods of taxation. By virtue of the tax imposed by North Carolina General Statute 105-228.12, North Carolina has adopted Method No. 4—a tax levied upon and measured by the entire net income of the banks, designated an Excise Tax. Thus, the State is precluded from any OTHER taxation of National Banks by the express language of Title 12 USCA, section 548, and the exemption of National Banks from the tax imposed by the act in question is in fact without importance. This federal statute, however, has nothing to do with the taxation of state banks.

IT IS PATENT FROM AN ANALYSIS OF THE ACT IN QUESTION THAT MANY FOREIGN AS WELL AS DOMESTIC CORPORATIONS ENGAGING IN THE INSTALLMENT PAPER DEALER BUSINESS ARE BEING DISCRIMINATED AGAINST IN FAVOR OF SOLELY DOMESTIC CORPORATIONS—STATE BANKS—ENGAGING IN THE SAME AND IDENTICAL TYPE OF BUSINESS.

As pointed out in the separate opinion in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 533, the equal protection clause should be applied to protect our federalism by denying a State the power constitutionally to discriminate in favor of its own residents against residents of other state members of our federation. See, Wheeling Steel Corp. v. Glander, 337 U.S. 562.

There is one other important reason why the questions presented are so substantial as to require plenary consideration. No other business in North Carolina is subjected to this type of taxation, super-imposed on all other corporate taxes levied; and no other state in the Union has ever enacted such legislation so far as we have been able to ascertain. The State of Missis-

sippi does have a tax of this nature (25c on the hundred dollars), but this is in lieu of all other privilege taxes; whereas in our State, it is in addition to all other privilege taxes and often amounts to more than the 6% tax on net corporate income. Furthermore as hereinbefore stated, in Mississippi, this tax is allowed as a credit on income taxes.

It is indeed a burdensome tax and can conceivably be the difference between a profit or loss, as this tax must be paid whether a dealer makes a net operating income or not.

A few of the cases sustaining our position in this case are as follows:

(1) The case of *Quaker City Cab Company vs. Pennsylvania*, 277 U.S. 389, dealing with a statute which selected the operation of taxi-cabs as a class for taxation and then exempted that portion of the operators who were individuals or partnerships. The Court, at page 402, says:

"In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, Supre. No decision of this Court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the State Court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See Railroad Tax case, 8 Sawy 238, 13 Fed. 722; Santa Clara County v. Southern R.R. Co., 9 Sawy 165, 18 Fed. 385; Northern P. R. Co. vs. Walker (C.C.) 47 Fed. 681. The tax cannot be sustained."

(2) The case of *Louisville Gas and Electric Company vs. Coleman*, 277 U.S. 32, wherein the Court, at page 37, held:

"The equal protection clause (of the Federal Constitution) means that the rights of all persons must rest upon the same rule under similar circumstances, . . . and applies to the exercise of all the powers of a state which can affect the individual or his property, including the power of taxation."

The Court concluded that a statute exempting from a tax upon mortgages lodged for record, instruments in which the indebtedness matures within five years, unconstitutionally deprives mortgages, not within the exception clause, of equal protection of the law.

(3) The case of *Wheeling Steel Corporation, vs. Glander*, 337 U.S. 562, wherein it is held at pages 572-574:

That a state ad valorem tax against certain intangible property, such as notes and accounts receivable, owned by foreign corporations and owing from out-of-state debtors, which at the same time exempts identical property owned by residents and domestic corporations, is invalid as violating the equal protection clause of the Fourteenth Amendment, and that equality is not restored by the fact that the exempted intangibles of residents are offered up to the taxing power of other states.

(4) The case of *Concordia Fire Insurance Company v. Illinois*, 292 U.S. 535, in which the Court, at page 545, held:

That a tax on net receipts of a foreign insurance company based on an assessment of their full value, when other personal property in the state is assessed at less than its full value, violates the equal protection clause of the Fourteenth Amendment. And at page 549, the Court points out that equal protection is denied foreign fire, marine and inland navigation insurance companies by construing a statute imposing a property tax on their net receipts as applicable to receipts from casualty insurance, while foreign casualty companies conducting a casualty business only, in direct competition with them, are not subject to such tax or any equivalent tax.

(5) The case of *Iowa Des-Moines National Bank vs. Bennett and Central State Bank vs. Bennett*, 284 U.S., 239, wherein it is held:

The taxation of state and national bank shares at a higher rate than the shares of competing domestic corporations is violative of the equal protection clause of the Fourteenth Amendment, although the taxing officers acted without authority and contrary to the law of the state where the exaction was made in the course of their official duties, in the name of and for the state, the money is retained by the state, and the judicial power of the state has been exercised in justifying the retention.

See Also:

Power Mfg. Co. vs. Saunders 274 U.S. 490
Southern Ry. Co. vs. Greer, 216 U.S. 400
Bell's Gap R.R. Co. vs. Penn, 134 U.S. 232
F. S. Royster Guano Co. vs. Va., 253 U.S. 412
Hanover Fire Ins. Co. vs. Harding, 272 U.S. 494

The State Supreme Court has by-passed a long line of its own decisions dealing with uniformity in taxation, one of its most recent cases being the case of *American Equitable Assurance Company vs. Gold*, 249 N.C. 461. (1959). In that case, the court was dealing with a statute imposing a premium tax on fire insurance companies, levied for the purpose of creating a Fireman's Pension Fund. Section 1½ of the act reads as follows: "Provided nothing in this act shall be construed to include Farmers Mutual Fire Insurance Associations." Justice Rodman in writing the opinion says:

"While several reasons are assigned to support the assertion of the invalidity, we find it necessary to pass on only one. i.e., Does sec. 1½ of the Act, reading 'Provided nothing in this Act shall be construed to include Farmers Mutual Fire Insurance Association,' destroy the uniformity of the tax levied by the Act and deprive plaintiffs of the equal protection and due process of law?"

In concluding his opinion he says further:

"No tax must be paid if insurance is purchased from a company defined in Sec. 1½ of the Act, G. S. 118-37. A tax must be paid if a purchase is made from any other insurance company.

The discrimination and lack of uniformity is apparent. A tax for the privilege of selecting between two competing insurance companies is contrary to fundamental justice and in violation of the specific requirement of Art. V, Sec. 3 of our Constitution. The judgment is reversed."

It is apparent that exactly the same situation is involved in the case at bar, and if an automobile dealer sells his consumer installment paper to a bank installment paper dealer, no tax is paid on the sale by any one. If the same paper is sold to a non-bank installment paper dealer and on exactly the same terms, a tax must be paid. They are two competing installment paper dealers. *One is taxed for making a purchase and the other is not.* The discrimination and lack of uniformity is certainly apparent.

CONCLUSION

For the reasons herein setforth, we believe that the questions presented by this appeal are substantial and are of such public interest that they should be reviewed by this Court. We believe that the State Court decision in this case definitely violates the Equal Protection Clause and Due Process Clause of the 14th Amendment to the Constitution of the United States. It is apparent that if this decision is permitted to remain in effect, it affords the opportunity in the future for arbitrary discrimination among taxpayers who are engaged in identically the same class of business and on the same basis, and for the sole reason that one of them happens to be engaged in some other business also. The decision is indeed a far reaching one, with possible serious consequences for future generations. We pray the Court, therefore, to assume jurisdiction to the end that the case may be heard on its merits.

Respectfully submitted
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APPENDIX I

NORTH CAROLINA — IN THE SUPERIOR COURT
WAKE COUNTY

LENOIR FINANCE COMPANY

V. — JUDGMENT

JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA

This cause coming on to be heard and being heard at the June 20, 1960 Civil Term of Wake County Superior Court, before the undersigned Judge assigned to and holding said term of Court, and being heard upon an agreed statement of facts without the intervention of a jury, jury trial of the cause having been duly waived, and the Court finding that the facts as stated in the agreed statement of facts are determinative of this cause and are the true facts, and after hearing argument of counsel, the Court being of the opinion that and so hold that Section 105-83 of the General Statutes of North Carolina is not unlawfully discriminatory or unconstitutional as applied to the plaintiff:

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that plaintiff take nothing by this action; that this action be, and the same is hereby dismissed, and that the costs of this action be taxed against the plaintiff.

/s/ HAMILTON H. HOBGOOD
Judge Presiding

APPEAL ENTRIES

To the signing of the foregoing judgment, the plaintiff objects; objection overruled and plaintiff excepts, and gives notice

of appeal to the Supreme Court, all in open court. Further notice waived. Appeal bond in the amount of $150.00 adjudged sufficient.

/s/ Hamilton H. Hobgood
Judge Presiding

APPENDIX I-A

NORTH CAROLINA SUPREME COURT

SPRING TERM 1961

LENOIR FINANCE COMPANY

V. No. 449—Wake

JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA

Appeal by plaintiff from Hobgood, J., June 1960 Civil Term of Wake. Docketed and heard here as No. 454, Fall Term 1960.

Plaintiff seeks to recover $1,911.36, taxes paid under protest. It alleges the statute under which the tax was levied is unconstitutional and void.

By agreement of the parties plaintiff's right to recover was made to depend on facts summarized and quoted as follows:

(1) Plaintiff is a domestic corporation with offices in Lenoir, Statesville, Hendersonville, Elkin, and Forest City, N. C. "The plaintiff is engaged in the business of an installment paper dealer as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina and is generally engaged in the auto finance business.

(2) The provisions of G. S. 105-83 are quoted as a part of the stipulated facts.

(3) "Many of the State and National Banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank installment paper dealers, and are doing a substantial volume of the installment paper dealer business in North Carolina."

(4) Plaintiff, an installment paper dealer and auto finance company, pays to North Carolina franchise, license, intangible, sales, and income taxes, and pays to the counties and cities in which it operates ad valorem taxes on its real and personal property. The taxes paid include the taxes levied pursuant to the provisions of G. S. 105-83.

(5) Plaintiff made the reports required by subsection (b) of G. S. 105-83 for the quarter ending 30 September, 1959 and paid under protest $1,911.36 as taxes imposed by said subsection, based on the report so made. The amount so paid was in addition to the tax levied pursuant to subsection (a) of G. S. 105-83.

(6) Within thirty days after payment plaintiff made written demand for refund. The demand was rejected. Plaintiff then instituted this action.

(7) Banks doing business in North Carolina, including national banking associations, are required by G. S. 105-228.12 to pay an excise tax equal to 4½% of their net income. The tax levied pursuant to that section is, by G. S. 105-228.13, in lieu of State intangible property, franchise, and income taxes, and taxes levied on tangible personal property by local taxing jurisdictions. State banks also pay the fees authorized by G. S. 53-122.

(8) National banks are taxed by North Carolina to the extent and manner permitted by Title 12 USCA, sec. 548.

"(9) The tax imposed by North Carolina General Statutes 105-83 on installment paper dealers is not imposed upon State or National banks, though many of them are also installment paper dealers in addition to their other activities, and by virtue of the provisions of Title 12 USCA, Section 548, such a tax may not be imposed upon National banks.

"(10) A substantial number of State and National Banks doing business in North Carolina engage in the business of

installment paper dealers as defined in G. S. 105-83, in addition to their other activities, as do the plaintiff and other non-bank installment paper dealers. All such installment paper dealers, banks and non-banks engage in substantially identical operations with respect to their installment paper business, which do not differ in any material respect, either as to the methods and mechanics of acquiring installment paper, or as to the business arrangements with the automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise. In general and in detail, the conduct of installment paper dealer business in North Carolina is and was at all times mentioned in the Complaint the same in all substantial and material respects, as engaged in and carried on by State and National banks and the plaintiff and other non-bank installment paper dealers.

"(11) In a substantial number of banks this installment paper dealer business is handled by a separate department of the bank commonly known as an Installment Loan Department or as a Time Payment Department, often in an office or building entirely separate from the main bank building, and the records, bookkeeping and management personnel in such department devote their full time exclusively to the contracting for, acquisition of, collecting of, servicing of this installment paper and to other work incident to this phase of the bank's operations and the same is substantially identical to the operations of non-bank installment paper dealers. Many of the banks maintaining Installment Loan Departments or Time Payment Departments keep these departments open beyond regular banking hours to conform to hours maintained by the plaintiff and other non-bank installment paper dealers.

"(12) It is further agreed that no facts other than those stated hereinabove are material or necessary to the decision of this case.

"(13) The question involved in this case is whether or not

G. S. Section 105-83 of the General Statutes of North Carolina, is unlawfully discriminatory and unconstitutional. If so, the plaintiff is entitled to recover of the defendant the sum of $1,911.36 with interest; and, if not, the plaintiff is not entitled to recover."

The court, being of the opinion that the statute is not unlawfully discriminatory or unconstitutional as applied to plaintiff, adjudged it take nothing. Plaintiff appealed.

Taylor, Allen and Warren and Fairley, Hamrick & Jack T. Hamilton for plaintiff appellant.

Attorney General Bruton and Assistant Attorneys General Abbott and Young for defendant appellee.

RODMAN, J. W. A. Johnson, successor in office to defendant Currie, was, on motion of the State, substituted as defendant.

The legislative power to tax is limited only by constitutional provisions. Sec. 3, Art. V of our Constitution imposes the duty to tax in a just and equitable manner. It further provides: "Taxes on property shall be uniform as to each class of property taxed." Specific authority is given to tax trades, professions, franchises, and incomes. Literally the requirement of uniformity is confined to taxes on property, but repeated judicial interpretations extend this requirement to license, franchise, and other forms of taxation. Assurance Co. v. Gold, 249 NC 461, 106 SE 2d 875; Roach v. Durham, 204 NC 587, 169 SE 149; S. v. Stevenson, 109 NC 730; Gatlin v. Tarboro, 78 NC 119.

A tax statute which suffices to meet the rule of uniformity required by our Constitution likewise conforms to the requirements of the Fourteenth Amendment of the U. S. Constitution.

Since courts are not charged with the duty of providing funds for the support of government, they have no right to weigh and determine legislative wisdom in selecting one form of tax

over another or one class rather than another or the proportion of the whole tax burden which any class should fairly assume. It is the duty of a court, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. Merely assigning different names to members of the same groups is not sufficient to meet constitutional requirements, but, as said by Mr. Justice Frankfurter: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Gigner v. Texas, 310 U.S. 141, 84 L ed 1124. Devin, J. (later C. J.), put it this way: "It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes under the power conferred by Art. V, sec. 3 of the Constitution." Bottling Co. v. Shaw, 232 NC 307, 59 SE 2d 819.

Courts have approved legislative distinctions between wholesale and retail merchants, Leonard v. Maxwell, 216 NC 89, 3 SE 316, appeal dismissed 308 U. S. 516; a single grocery store and a chain or grouping of such stores, Tea Co. v. Maxwell, 199 NC 433, 154 SE 838, affirmed 284 U.S. 575; volume of business, Nesbitt v. Gill, 227 NC 174, 41 SE 2d 646, affirmed 332 U.S. 749; Mercantile Co. v. Mt. Olive, 161 NC 121, 76 SE 690; Cobb v. Commissioners, 122 NC 307; businesses conducted in areas of differing populations, S. v. Green, 126 NC 1032; S. v. Carter, 129 NC 560; handlers of meat products, Lacy v. Packing Co., 134 NC 567, affirmed 200 U. S. 226; vending machines selling different kinds of merchandise, Snyder v. Maxwell, 217 NC 617, 9 SE 2d 19; transportation companies, based on mileage, Clark v. Maxwell, 197 NC 604, 150 SE 190, affirmed 282 U.S. 811; a retail sale by the producer of an article and the sale of the same article by a merchant, Henderson v. Gill, 229 NC 313, 49 SE 2d 754; stock companies and mutual insurance companies, German Alliance Ins. Co. v.

Lewis, 233 U.S. 389, 58 L ed 1011; an agent whose business is selling accident insurance and an agent of a transportation company who sells accident insurance as an incident and a part of his business of selling transportation, Hunter v. Wright, 152 SE 61 (Ga.); drug stores and news stands, even though both sell newspapers, magazines, tobacco, and soft drinks, S. v. Towery, 239 NC 274, 79 SE 2d 513, appeal dismissed 347 U.S. 925.

Legislatures have for many years grouped and classified those engaged in lending money based on the manner in which the business was conducted. Pawn brokers are nearly always put in a class distinct from other money lenders, and this classification has been upheld. S. v. Davis, 157 NC 648, 73 SE 130; S. v. Hill, 69 ALR 574, with annotations; Metropolitan Trust Co. v. Jones, 149 ALR 1415, with annotations. True, most of these cases deal with the exercise of the police power rather than the power to tax, but the principle involved is the same. Classification, to be valid, must rest on a genuine distinction.

We assume the parties did not, by the 12th stipulation that no facts except as stipulated were material or necessary to a decision of the case, intend to deny us the right to take notice of pertinent public laws and facts common and general knowledge.

'It is a matter of general knowledge that loans can be obtained by borrowers from many distinct kinds of business. The Federal Government has created special agencies to help certain types of borrowers. Illustrative: Home Owners Loan Corporation and Federal Land Banks, which, as federal agencies are free from State taxes. The principal private businesses making loans are insurance companies, taxed pursuant to Art. 8 b of our Revenue Act (c. 105 of the General Statutes); banks, taxed pursuant to Art. 8 c of the Revenue Act; building and loan associations, taxed pursuant to Art. 8 d; pawn brokers, taxed under G. S. 105-50; installment paper dealers, licensed and

taxed under G. S. 105-83; loan agencies or brokers, licensed and taxed under G. S. 105-88. Each of these varying kinds of businesses is defined by statute. Probably all make some loans identical in all respects with loans made by some other lending agency, but that fact does not make the businesses identical.

Installment paper dealers are defined by statute, G. S. 105-83, as "engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations." Those engaged in this business are by subsec. a of the statute required to pay an annual license tax of $100, and by subsec. b, to pay quarterly a tax equal to .275 of 1% of the face value of the obligations handled during such quarter.

The asserted invalidity of the statute is based on subsec. d, which reads: "This section shall not apply to corporations organized under the State or national banking laws." Although appellant has paid the taxes levied under subsecs. a and b, it does not claim that the tax levied under subsec. a is invalid. It limits its claim of invalidity to subsec. b. but if the statute is invalid because installment paper dealers and banks are in fact in the same class, the entire statute would fail, not merely subsec. b leaving in effect subsec. a which requires payment of $100 per year.

The business taxed under G. S. 105-83 is of comparatively recent origin. It came into existence primarily as a means to facilitate the sale of motor vehicles. We take judicial knowledge of the fact that there are many corporations engaged in this business. Some are financial giants and national in scope. Their shares are listed on various stock exchanges. Their resources run into hundreds of millions. They establish lines of credit and borrow from banks and insurance companies.

They are created under statutes which authorize the creation of business corporations in general. They do not have to secure a certificate of convenience and necessity to begin business. They do not receive deposits.

On the other hand, the statutory definition of a bank is "any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business." G. S. 53-1. Before a bank can be created, application must be made to the Commissioner of Banks who must determine the need for such an institution, fitness of the proposed incorporators to conduct the proposed business, and their ability to command the confidence of the community, G. S. 53-4. The powers which a bank may exercise are enumerated in G. S. 53-43. Their right to make investments and the kinds of investments which they may make are restricted, G. S. 53-46, 48. Banks must keep on hand or in approved depositories a fixed per cent of the monies on deposit, G. S. 53-50. They cannot establish branch offices without the approval of the Commissioner of Banks, G. S. 53-62. They are subject to regulations promulgated by the Commissioner of Banks, G. S. 53-104.

The foregoing are some of the things that distinguish a bank from an installment paper dealer. The distinction between banks and installment paper dealers is at least as great as the distinction between installment paper dealers and loan agencies or brokers, G. S. 105-88. The Legislature, in providing funds for governmental needs, had a right to recognize these distinctions. If perchance some banks are operating contrary to law and regulations promulgated by the Commissioner, that fact would not nullify a statute properly enacted by the Legislature.

Not long after the business defined by statute as installment paper dealers became economically important, several States, recognizing the distinction between such a business and the business of banking, taxed them differently. Where such statutes

were challenged as arbitrary classifications, the courts upheld legislative action. Dewey v. Richardson, 92 NE 708; Cowart v. Greenville, 45 SE 122; City Council v. Clark & Co., 52 SE 881; Morris v. Lincoln, 142 NW 114; Link v. Commonwealth, 265 SW 804; Ormes v. Tenn. Finance Co., 269 SW 3; Bradley & Co. v. Richmond, 66 SE 872.

The facts stipulated, supplemented as they must be by matters of which we take judicial notice, support the conclusion reached by the trial court that plaintiff was not entitled to recover because of the asserted invalidity of the statute.

Affirmed

APPENDIX I-B

Order on petition to rehear filed on July 7, 1961 was as follows: "Examined and denied this 7th July 1961. R. Hunt Parker and Carlisle W. Higgins, Associate Justices N. C. Supreme Court."

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In the

Supreme Court of the United States

October Term, 1961

LENOIR FINANCE COMPANY,
Appellant,

v.

JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, (W. A. JOHNSON, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, SUBSTITUTED DEFENDANT),
Appellee.

No. 490

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION TO DISMISS

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OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 254 N. C. 129, 118 S. E. (2d) 543, and is reprinted herein as Appendix B.

STATEMENT OF CASE

The appellant is a corporation organized under the laws of the State of North Carolina and it is engaged in the business of an Installment Paper Dealer, as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina, and is generally engaged in the automobile financing business. A stipulation to this effect was included in the first paragraph of the Agreed Statement of Facts, upon which this case was heard by the trial court. The statute involved, G. S. 105-83, is printed in full herein as Appendix A.

Since 1929, the State of North Carolina has imposed an annual license tax of $100.00 and an additional license tax measured by the gross amount of installment paper handled upon installment paper dealers. Chapter 345, §148, 1929 Public Laws of N. C. During 1959, a similar annual license tax of $100.00 and the additional license tax measured by the amount of gross business was collected from this plaintiff and other persons, firms or corporations, foreign or domestic, engaged in the business of acting as installment paper dealers in North Carolina under G. S. 105-83; Section 148, Chapter 158, 1939 Session Laws of N. C., as amended.

From 1929 to the present, the North Carolina Installment Paper Dealers License Tax Law has contained an exemption reading:

> "(d) This section shall not apply to corporations organized under the State or national banking laws."

The appellant contends that this exemption of State and national banks from the North Carolina Installment Paper Dealers License Tax results in deprivation of property of the appellant without due process of law and denial of the equal protection of the laws by the State of North Carolina in levy-

ing and collecting the Installment Paper Dealers additional license tax from appellant for a part of the year 1959. The stipulated facts, on which the case was heard below, show that many of the State and national banks in North Carolina actually perform the same function as Installment Paper Dealers, as defined in G. S. 105-83, and it is conceded that the banks engaging in this function are "in substantial competition" with the appellant herein.

It was also stipulated in the Agreed Statement of Facts, on which this case was tried below, that North Carolina levies an annual excise tax on every State and national bank doing business in North Carolina. The tax is measured by a percentage of the entire net income of the banks. The tax is levied upon banks for the privilege of transacting the banking business in North Carolina during the calendar year for which the tax is levied. Section 105-228.12 of the North Carolina General Statutes. It was also stipulated that the sole authority of North Carolina to tax national banks was contained in Title 12, U.S.C., § 548, that North Carolina *did not* impose the Installment Paper Dealers license tax upon State or national banks, that it *could not* impose the Installment Paper Dealers license tax upon national banks, that, since 1957, North Carolina had taxed State and national banks in the same manner and under the same statutory provisions.

The most significant stipulations, upon which this case was tried below, are printed at pages 6 through 9 of the Jurisdictional Statement filed herein by appellant. These agreed facts, in summary, show that North Carolina imposes a flat, annual license tax on persons, firms and corporations, *foreign or domestic*, engaged in the business of acting as installment paper dealers in North Carolina, that State and national banks, as a part of their banking business, do some of the same things that Installment Paper Dealers do, to wit: ". . . buying and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in . . ." North Carolina, that such paper is taken to

secure payment of the obligations which they represent. On these facts, appellant contends that the fact that North Carolina allows State and national banks to *compete* with Installment Paper Dealers without paying the same license tax makes the additional license tax upon appellant unlawful as being in contravention of the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The State of North Carolina contends that its legislature has the power to classify for tax purposes, that it lawfully exercised its powers of classification in placing State and national banks in one class and in placing the appellant and others engaged in the installment paper dealer business in another class, that the facts in this case do not reveal any deprivation of property of appellant without due process of law or any denial of equal protection of the laws to the appellant by the State of North Carolina. Hence, no substantial Federal question is presented.

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

This case, in which appellant seeks to have reviewed a decision of the highest court of the State of North Carolina, does not present a substantial Federal question and ought to be dismissed. Rule 16(1)(b). The Jurisdictional Statement filed herein does not show that substantial Federal questions are presented, such as require a full consideration of this case by this Court. Rule 15(1)(e). Where the questions raised below have been answered by this Court and are no longer open, review should not be allowed. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Merrick Co.*, 254 U. S. 376. This Court has affirmed, without opinion, a decision of the North Carolina Supreme Court upholding the constitutionality of one of its license tax statutes, where the court below relied on authoritative decisions by the Supreme Court of the United States holding that state legislatures had the power to classify for tax purposes and that the classification would be upheld unless clearly arbitrary. *Clark v. Maxwell*,

Commissioner of Revenue, 197 N. C. 604, 150 S. E. 190, *affirmed* 282 U. S. 811. This Court has also dismissed an appeal, for want of a substantial Federal question, from a North Carolina Supreme Court decision upholding the validity of a license or privilege tax imposed on retail merchants and measured by three per cent of gross sales. Ample authorities of this Court are catalogued therein demonstrating the powers of the State to classify for tax purposes, to draw distinctions which are not arbitrary, and to discriminate among classes based on reasonable differences. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316, *appeal dismissed* 308 U. S. 516. A review of the opinion of the North Carolina Supreme Court in the instant case would add nothing new to the compendium of authority now available on the constitutional questions decided below.

This Court had an opportunity to consider the question of the validity of a State privilege license tax similar to the one in this case, when the Mississippi Supreme Court sustained the validiy of its statute in a series of cases in 1942. A summary of the principle of legislative classification approved in those cases appears at 53 C.J.S., *Licenses*, §22, page 544, n. 46, which reads:

"Finance companies and banks

"Fact that the statute levying a privilege tax on every person doing a business of acquiring notes or other forms of indebtedness secured by liens on automobiles and other tangible personalty exempts banks from the tax does not render statute unconstitutional as applied to a finance company, since there is a reasonable basis for distinction between such companies and banks." (citing *Stone v. General Electric Contracts Corporation*, 193 Miss. 317, 7 So. 2d 811, *followed* in *Stone v. Universal Credit Company*, 193 Miss. 354, 7 So. 2d 820, and *Stone v. Yellow Manufacturing Acceptance Corporation*, 193 Miss. 338, 7 So. 2d 820, *affirmed* 317 U. S. 591, *rehearing denied* 317 U. S. 708.)

In *Stone v. General Electric Contracts Corporation, supra,* the Mississippi Court said that banks were required to bear their rightful share of taxes necessary for the support of the State, that they did this in exchange for the right to engage in a "general banking business", and that there was a reasonable basis for a distinction between banks and the appealing finance company. It did appear that this Court had jurisdiction in the companion cases involving the same state tax, and this Court approved the holding of the Mississippi Court by a *per curiam* opinion granting the motions to affirm and affirming the judgments below. The Mississippi Court, in its opinions dealing with the license tax in question, cited decisions of this Court as the basis for its conclusions regarding the constitutional questions raised.

The only question involved in this case is whether the distinction drawn by the North Carolina General Assembly between installment paper dealers and banks, which admittedly deal in notes and chattel mortgages as do installment paper dealers, is valid. Of course, the problem with which appellant is really concerned is the question of competition from banks. If appellant were really concerned about the fact that national and state banks were not required to pay the same license tax as appellant, this question could easily be answered by a severability clause contained in the North Carolina Revenue Act, as amended, reading:

> "If any clause, sentence, paragraph, or part of this Act for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." Section 940, Chapter 158, 1939 Public Laws of N. C.

It is apparent that appellant is not as interested in seeing the exemption removed as it is in avoiding payment of the additional license tax imposed by G. S. 105-83(b). The ap-

pellant does not complain of the $100.00 annual license tax levied, assessed and collected from it under authority of G. S. 105-83(a). This action was instituted to recover only the *additional license tax* paid by the appellant under G. S. 105-83(b). (Opinion Below; Appendix B)

In its Jurisdictional Statement, appellant argues that banks "...directly compete with a large segment of the business community..." (p 11), that the installment paper offices of some banks are kept open "... *all day (until five o'clock)*" (p 13), that banks are "... doing approximately 50% or more of the installment paper dealer business..." in North Carolina (p 18) (this information not in evidence anywhere), that installment paper dealers pay approximately $600,000.00 to the State of North Carolina annually for the additional license tax (p 18) (this information not in evidence anywhere), "...that the net result of the act is a highly inequitable discrimination against many foreign corporations that have domesticated in North Carolina to carry on their financial activities..." (p 19) (the question of burden on interstate commerce not raised by pleadings or evidence). This Court has formerly said that:

> "The State may tax different types of taxpayers differently even though they compete ... legislation may protect from the consequences of competition but the Constitution does not. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. These were risks which appellant took when it entered the field." *Puget Sound Power and Light Company v. Seattle*, 291 U. S. 619.

In another case where different tax treatment was given to a meat packing house doing business in North Carolina in direct competition with commission merchants, brokers and butchers engaged in the business of selling packing house products similar to those sold by the defendant, the validity of the tax classification was upheld. *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53, *affirmed* 200 U. S.

226. The net result of that case is the establishment of the principle that two persons selling meat at wholesale may be separately classified for license tax purposes upon any reasonable grounds of distinction, and that principle has been approved by this Court on many occasions.

In *Quong Wing v. Kirkendall*, 223 U. S. 59, a Montana laundry license tax statute was declared valid by this Court even though it exempted steam laundries and women engaged in the laundry business where not more than two women were employed. Of this statute making a distinction between hand laundries and steam laundries, Mr. Justice Holmes said:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and tax system in such a way as to favor certain industries or forms of industry . . . If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair . . . the 14th Amendment does not interfere by creating fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state."

Installment Paper Dealers are engaged in buying, discounting and dealing in installment paper. Banks are financial institutions which accept deposits for safekeeping, make direct loans to customers, issue certificates of deposit, cashier's checks and certified checks, and generally engage in a great many activities which distinguish banks and the banking business from Installment Paper Dealers and the business of dealing in installment paper. The North Carolina General Assembly saw a difference and promulgated licensing and taxing provisions based on that difference. The Supreme Court of North Carolina, applying well defined principles of constitutional law enunciated by this Court, found the classification to be reasonable, not arbitrary, and sustained the imposition of a license tax on installment paper dealers while exempting state and national banks from the same

tax. It is to be noted that a privilege license tax is imposed elsewhere by the State of North Carolina on state and national banks.

Congress has approved the separate classification of national banks for taxing purposes in the enactment of the statute now codified as Title 12, United States Code, Section 548. National banks may be taxed by a state only as expressly permitted by Congress. *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239; *First Nat. Bank v. Anderson*, 269 U. S. 341. The validity of 12 U.S.C. §548, has been sustained. *First Nat. Bank v. Anderson, supra.* Since 1957, the State of North Carolina has classified all state banks along with national banks and has imposed a privilege license tax on all of them in the same manner, including commercial banks, industrial banks, savings banks, trust companies or any combination of such facilities. G. S. 105-228.11. If the separate classification of banks from other financial institutions performing *one* of the functions of a bank is justified, a review by this Court would merely prolong this case and serve no useful purpose as no substantial Federal question is raised by the appeal from the State Court.

In the Jurisdictional Statement filed by appellant, many decisions of the United States Supreme Court are cited in support of the contention that the Federal questions presented by this appeal are substantial. When those cases are closely examined, it will be seen that they enunciate general propositions of constitutional law, which are well settled. It is those principles of law which the North Carolina General Assembly has followed in imposing license taxes on the appellant and others engaged in the same business, and those general principles are the basis for the decisions of the North Carolina Supreme Court. The cases cited are *not* authority for the proposition that a substantial Federal question is raised on this appeal. For example, appellant argues at page 15 of the Jurisdictional Statement that "Classification must always rest upon distinctions which bear a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily without such

basis." With this principle, we agree. With the holdings of the cases there cited, we agree. A statute requiring railroad companies, who refuse to pay claims against them within a certain time, to pay $10.00 in attorneys' fees, when judgment is rendered against the railroad on the claim, is a denial of due process and equal protection of the laws, as such a statute imposes a burden on railroads while not requiring other individuals and corporations in similar circumstances to bear the same burden. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. This case clearly illustrates what a state legislature *may not* do. An inheritance tax adopted by California is valid even though it does not allow a deduction of an estate tax in determining market value of the property in the estate. *Stebbins v. Riley*, 268 U. S. 137.

We agree that a state may not discriminate in favor of a domestic railroad by imposing a franchise tax on foreign corporations doing a railroad business within the state when domestic corporations doing the same business do not pay the tax. *Southern Railway Co. v. Greene*, 216 U. S. 400. We agree that Illinois could not constitutionally exempt agricultural and livestock dealers from its statute prohibiting restraint of trade, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. We also think this Court was correct in declaring invalid an Ohio venue statute which treated domestic corporations different from foreign corporations, *Power Mfg. Co. v. Saunders*, 274 U. S. 490, and this Court correctly upheld Indiana's graduated occupational tax, which resulted in a higher tax on chain stores than on stores individually operated, *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, but none of these cases cited at page 15 of the Jurisdictional Statement filed herein give any support to the contention that a substantial Federal question is presented by the appeal of the instant case.

In an opinion by Mr. Justice Roberts, in the last cited case, the constitutional principles on which the validity of the North Carolina license taxing statute is founded are stated as follows:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. (Citing cases.) The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. (Citing cases.) As was said in *Brown-Forman Co. v. Kentucky*, supra (217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578):

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear." *supra*, p. 537.

Beginning on page 18 of the Jurisdictional Statement, appellant argues that there are questions presented on ap-

peal which are so substantial as to require plenary consideration by the Court. All of that argument on pages 18 and 19 deals with some evidence, *not heretofore presented in the case*, regarding the amount of tax paid to the State of North Carolina by all installment paper dealers, the amount of installment paper purchased or handled by banks, and alleged discrimination against foreign corporations carrying on business in North Carolina. Appellant attempts to relate this to the "due process" argument, but it should be enough to say that the appellant is a *"small* North Carolina corporation" (p. 1, Jurisdictional Statement of Appellant), and it has no standing to present, at this stage, an argument to the effect that North Carolina discriminates against foreign financial corporations by imposing on them a burdensome tax, while not imposing the same tax on State and national banks doing business in North Carolina.

On page 20 of the Jurisdictional Statement filed herein, appellant concedes that the State of North Carolina could not impose an additional license tax, measured by a percentage of installment paper business handled, on national banks. Appellant also observes that the Federal statute, 12 U.S.C. § 548, has nothing to do with taxation of state banks, but there is nothing to suggest that the North Carolina General Assembly has exceeded its classification powers in taxing State and national banks on the same basis.

At the same place, appellant cites authority to the effect that a state may not constitutionally discriminate in favor of its own residents and against the residents of another state. *Allied Stores of Ohio v. Bowers*, 358 U. S. 522; *Wheeler Steel Corp. v. Glander*, 337 U. S. 562. We agree with the constitutional principles enunciated, but the North Carolina licensing tax statute which offends the appellant in this case applies to all persons, firms or corporations engaged in the installment paper dealer business, ". . . foreign or domestic . . .". G. S. 105-83(a) (Appendix A)

At page 21 of the Jurisdictional Statement, the appellant argues that the North Carolina license tax on installment

paper dealers is a ". . . burdensome tax and can conceivably be the difference between a profit or loss, as this tax must be paid whether a dealer makes a net operating income or not." The same can be said of many franchise and license taxes lawfully levied, but there is nothing in evidence in this case to prove that the license tax of which appellant complains is so burdensome as to amount to a deprivation of property without due process of law. The only evidence in the case regarding the impact of the tax on the appellant is the stipulation to the effect that the appellant paid $1911.36 to the State for one quarter during the year 1959. The test whether property has been taken without due process is ". . . whether the taxing power asserted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444. There is no evidence in this case to prove the absence of justification for taxing appellant in a different manner than banks are taxed.

In its argument that the North Carolina tax deprived appellant of its property without due process, the appellant cites *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, in which this Court held that a state could not tax corporations operating taxicabs in a different way than it taxed individuals and partnerships operating taxicabs. Under the North Carolina statute in question, all installment paper dealers, individual and corporate, are taxed alike.

In *Louisville Gas and Electric Company v. Coleman*, 277 U. S. 32, cited at page 22 of appellant's Jurisdictional Statement, it was held that a mortgage recording tax was invalid, where mortgages maturing within five years were excepted from its provisions, but it was said in the same case that the legislature could validly exempt mortgages given to building and loan associations from the recording tax. In *Concordia Fire Insurance Company v. Illinois*, 292 U. S. 535, this Court held that a tax on net receipts of insurance companies which discriminated against foreign insurance companies was not valid. Here again, the North Carolina statute applies alike to foreign and domestic installment paper dealers. The case of *Southern Ry. Co. v. Greene*, 216 U. S. 400, also deals with a

state tax discriminating against foreign corporations and in favor of domestic corporations. *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494, and *F. S. Royster Guano Co. vs. Va.*, 253 U. S. 412, cited at page 23 of the Jurisdictional Statement, deal again with discrimination in taxing statutes between domestic and foreign corporations. We agree that this may not be done without contravening the Fourteenth Amendment to the United States Constitution. The *Bell's Gap R. R. Co. vs. Penn.* case, 134 U. S. 232, holding that a state statute imposing a tax on bonds and the method of collection of same do not deny due process, like the other authority cited in the Jurisdictional Statement, does not sustain the proposition that this case presents substantial Federal questions which should be considered and answered by this Court.

At pages 23 and 24 of the Jurisdictional Statement, appellant cites *American Equitable Assurance Company v. Gold*, 249 N. C. 461, 106 S. E. (2d) 875, in which the North Carolina Supreme Court declared a fire insurance premiums tax to be discriminatory and unconstitutional. The reason the tax was declared to be discriminatory was that it was passed on to purchasers of fire insurance unequally. The Court called attention to the fact that the tax was not placed on the insurance companies as a condition to writing insurance. It was not, therefore, a license tax, which was involved in that case. The case does not suggest that the State of North Carolina is powerless to discriminate between different classes of insurance companies in levying a license tax.

State courts have long understood that a privilege license tax may be validly imposed upon lending agencies acquiring notes on personal property as security while exempting banks from such a tax. *Austin v. City of Seattle*, 176 Wash. 654, 30 P. 2d 646; *Link v. Commonwealth*, 205 Ky. 243, 265 S. W. 804; *Shinn v. Oklahoma City*, 59 Okl. Cr. 433, 61 P. 2d 1126; *Stone v. General Electric Contracts Corporation, supra; Stone v. Universal Credit Company, supra;* and *Stone v. Yellow Manufacturing Acceptance Corporation, supra*, which was affirmed by this Court in 1942.

State courts have also long understood that valid distinctions may be made in the licensing of certain persons engaged in the money lending business while exempting or excepting banks. Some of these cases are listed at the close of the opinion below. (Appendix B) *Dewey v. Richardson*, 206 Mass. 430, 92 N. E. 708; *Cowart v. Greenville*, 67 So. C. 35, 45 S. E. 122; *City Council v. Clark & Co.*, 124 Ga. 651, 52 S. E. 881; *Morris v. City of Lincoln*, 93 Neb. 658, 142 N. W. 114; *Link v. Commonwealth, supra, Ormes v. Tennessee Finance Co.*, 152 Tn. 40, 269 S. W. 3; *Bradley v. City of Richmond*, 110 Va. 521, 66 S. E. 872, *affirmed* 227 U. S. 477.

The power of states to classify those engaged in different types of businesses for the purpose of imposing privilege license taxes has long been recognized. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316, appeal dismissed for want of a substantial Federal question, 308 U. S. 516 (where Stacy, C. J., catalogued some permitted distinctions in tax classification and cited principal decisions of this Court on the subject.)

The North Carolina Supreme Court had a State privilege license tax case before it in 1947. *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. (2d) 646. The statute imposed a flat annual tax on certain dealers in horses and mules and an additional license tax graduated according to volume of business. Two significant excerpts from the opinion in that case summarize the understanding of North Carolina taxing authorities and judicial authorities as to the powers of the State to levy privilege or license taxes similar to the one in the instant case without contravening the Fourteenth Amendment of the Constitution of the United States.

(1) "The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax."

(2) "It has been the practice of our General Assembly for many years to levy what is considered a nominal sum for an annual license for engaging in some classes of trades and to levy in addition thereto, an additional privilege or license tax measured by some reasonable method for as-

certaining the volume of business transacted in the State." p. 179.

The decision of the North Carolina Supreme Court was affirmed in a *per curiam* decision at 332 U. S. 749.

We think it is clear that the North Carolina General Assembly acted within the due process and equal protection limitations imposed by the Fourteenth Amendment in adopting G. S. 105-83, in providing therein for an exemption of State and national banks from the license tax on persons, firms and corporations, foreign and domestic, engaged in the "Installment Paper Dealer" business in North Carolina, and in levying a tax at an annual rate with an additional license tax measured by volume of business and applying equally to all of those within the described class. There was no violation of the Fourteenth Amendment in the collection of the Installment Paper Dealers License Tax from the appellant herein, and this case does not present a substantial Federal question.

MOTION TO DISMISS

For the reasons hereinbefore set out, the Attorney General of North Carolina moves the Court to dismiss this appeal on the ground that it does not present a substantial Federal question.

Respectfully submitted,

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APPENDIX A

Statute Involved

§105-83. Installment paper dealers.—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligation, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business of dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State un-

til and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section.

The foregoing statute is contained in Subchapter I of Chapter 105 of the General Statutes of the State of North Carolina (The Revenue Act of North Carolina, as amended), Volume 2C, page 580, 1958 Replacement Volume, General Statutes of North Carolina.

APPENDIX B

Statement and Opinion of the Supreme Court of North Carolina

Appeal by plaintiff from *Hobgood, J.*, June 1960 Civil Term, of Wake. Docketed and heard here as No. 454, Fall Term, 1960.

Plaintiff seeks to recover $1911.36, taxes paid under protest. It alleges the statute under which the tax was levied is unconstitutional and void.

By agreement of the parties plaintiff's right to recover was made to depend on facts summarized and quoted as follows:

(1) Plaintiff is a domestic corporation with offices in Lenoir, Statesville, Hendersonville, Elkin, and Forest City, N. C. "The plaintiff is engaged in the business of an installment paper dealer as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina and is generally engaged in the auto finance business.

(2) The provisions of G. S. 105-83 are quoted as a part of the stipulated facts.

(3) "Many of the State and National Banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank installment paper dealers, and are doing a substantial volume of the installment paper dealer business in North Carolina."

(4) Plaintiff, an installment paper dealer and auto finance company, pays to North Carolina franchise, license, intangible, sales, and income taxes, and pays to the counties and cities in which it operates *ad valorem* taxes on its real and personal property. The taxes paid include the taxes levied pursuant to the provisions of G. S. 105-83.

(5) Plaintiff made the reports required by subsection (b) of G. S. 105-83 for the quarter ending 30 September 1959 and paid under protest $1911.36 as taxes imposed by said subsection, based on the report so made. The amount so paid was in addition to the tax levied pursuant to subsection (a) of G. S. 105-83.

(6) Within thirty days after payment plaintiff made written demand for refund. The demand was rejected. Plaintiff then instituted this action.

(7) Banks doing business in North Carolina, including national banking associations, are required by G. S. 105-228.12 to pay an excise tax equal to 4-1/2% of their net income. The tax levied pursuant to that section is, by G. S. 105-228.13, in lieu of State intangible property, franchise, and income taxes, and taxes levied on tangible personal property by local taxing jurisdictions. State banks also pay the fees authorized by G. S. 53-122.

(8) National banks are taxed by North Carolina to the extent and manner permitted by Title 12, USCA, sec. 548.

"(9) The tax imposed by North Carolina General Statutes 105-83 on installment paper dealers is not imposed upon

State or National banks, though many of them are also installment paper dealers in addition to their other activities, and by virtue of the provisions of Title 12, USCA, Section 548, such a tax may not be imposed upon National banks.

"(10) A substantial number of State and National Banks doing business in North Carolina engage in the business of installment paper dealers as defined in G. S. 105-83, in addition to their other activities, as do the plaintiff and other non-bank installment paper dealers. All such installment paper dealers, banks and non-banks engage in substantially identical operations with respect to their installment paper business, which do not differ in any material respect, either as to the methods and mechanics of acquiring installment paper, or as to the business arrangements with the automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise. In general and in detail, the conduct of installment paper dealer business in North Carolina is and was at all times mentioned in the Complaint the same in all substantial and material respects, as engaged in and carried on by State and National banks and the plaintiff and other non-bank installment paper dealers.

"(11) In a substantial number of banks this installment paper dealer business is handled by a separate department of the bank commonly known as an Installment Loan Department or as a Time Payment Department, often in an office or building entirely separate from the main bank building, and the records, bookkeeping and management personnel in such department devote their full time exclusively to the contracting for, acquisition of, collecting of, servicing of this installment paper and to other work incident to this phase of the bank's operations and the same is substantially identical to the operations of non-bank installment paper dealers. Many of the banks maintaining Installment Loan Departments or Time Payment departments keep these departments open beyond regular banking hours to conform to hours maintained by the plaintiff and other non-bank installment paper dealers.

"(12) It is further agreed that no facts other than those stated hereinabove are material or necessary to the decision of this case.

"(13) The question involved in this case is whether or not G. S., Section 105-83 of the General Statutes of North Carolina, is unlawfully discriminatory and unconstitutional. If so, the plaintiff is entitled to recover of the defendant the sum of $1,911.36 with interest; and, if not, the plaintiff is not entitled to recover."

The court, being of the opinion that the statute is not unlawfully discriminatory or unconstitutional as applied to plaintiff, adjudged it take nothing. Plaintiff appealed.

Taylor, Allen and Warren and Fairley, Hamrick & Jack T. Hamilton for plaintiff, appellant.

Attorney General Bruton and Assistant Attorneys General Abbott and Young for defendant, appellee.

RODMAN, J. W. A. Johnson, successor in office to defendant Currie, was, on motion of the State, substituted as defendant.

The legislative power to tax is limited only by constitutional provisions. Sec. 3, Art. V of our Constitution imposes the duty to tax in a just and equitable manner. It further provides: "Taxes on property shall be uniform as to each class of property taxed." Specific authority is given to tax trades, professions, franchises, and incomes. Literally the requirement of uniformity is confined to taxes on property, but repeated judicial interpretations extend this requirement to license, franchise, and other forms of taxation. *Assurance Co. v. Gold*, 249 N. C. 461, 106 S. E. 2d 875; *Roach v. Durham*, 204 N. C. 587, 169 S. E. 149; *S. v. Stevenson*, 109 N. C. 730; *Gatlin v. Tarboro*, 78 N. C. 119.

A tax statute which suffices to meet the rule of uniformity required by our Constitution likewise conforms to the

requirements of the Fourteenth Amendment of the U. S. Constitution.

Since courts are not charged with the duty of providing funds for the support of government, they have no right to weigh and determine legislative wisdom in selecting one form of tax over another or one class rather than another or the proportion of the whole tax burden which any class should fairly assume. It is the duty of a court, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. Merely assigning different names to members of the same groups is not sufficient to meet constitutional requirements, but, as said by *Mr. Justice Frankfurter*: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 84 L. ed. 1124. *Devin, J.* (later C. J.), put it this way: "It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes under the power conferred by Art. V, sec. 3 of the Constitution." *Bottling Co. v. Shaw*, 232 N. C. 307, 59 S. E. 2d 819.

Courts have approved legislative distinctions between wholesale and retail merchants, *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. 2d 316, appeal dismissed 308 U. S. 516; a single grocery store and a chain or grouping of such stores, *Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838, affirmed 284 U. S. 575; volume of business, *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. 2d 646, affirmed 332 U. S. 749; *Mercantile Co. v. Mt. Olive*, 161 N. C. 121, 76 S. E. 690; *Cobb v. Commissioners*, 122 N. C. 307; businesses conducted in areas of differing populations, *S. v. Green*, 126 N. C. 1032, *S. v. Carter*, 129 N. C. 560; handlers of meat products, *Lacy v. Packing Co.*, 134 N. C. 567, affirmed 200 U. S. 226; vending machines selling different kinds of merchandise, *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. 2d 19; transportation companies, based on mileage, *Clark v. Maxwell*, 197 N. C. 604, 150 S. E. 190, af-

firmed 282 U. S. 811; a retail sale by the producer of an article and the sale of the same article by a merchant, *Henderson v. Gill*, 229 N. C. 313, 49 S. E. 2d 754; stock companies and mutual insurance companies, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L ed 1011; an agent whose business is selling accident insurance and an agent of a transportation company who sells accident insurance as an incident and a part of his business of selling transportation, *Hunter v. Wright*, 152 S. E. 61 (Ga.); drug stores and news stands, even though both sell newspapers, magazines, tobacco, and soft drinks, *S. v. Towery*, 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed 347 U. S. 925.

Legislatures have for many years grouped and classified those engaged in lending money based on the manner in which the business was conducted. Pawn brokers are nearly always put in a class distinct from other money lenders, and this classification has been upheld. *S. v. Davis*, 157 N. C. 648, 73 S. E. 130; *S. v. Hill*, 69 A.L.R. 574, with annotations; *Metropolitan Trust Co. v. Jones*, 149 A.L.R. 1416, with annotations. True, most of these cases deal with the exercise of the police power rather than the power to tax, but the principle involved is the same. Classification, to be valid, must rest on a genuine distinction.

We assume the parties did not, by the 12th stipulation that no facts except as stipulated were material or necessary to a decision of the case, intend to deny us the right to take notice of pertinent public laws and facts of common and general knowledge

It is a matter of general knowledge that loans can be obtained by borrowers from many distinct kinds of business. The Federal Government has created special agencies to help certain types of borrowers. Illustrative: Home Owners Loan Corporation and Federal Land Banks, which as federal agencies, are free from State taxes. The principal private businesses making loans are insurance companies, taxed pursuant to Art. 8 b of our Revenue Act (c. 105 of the General Statutes); banks, taxed pursuant to Art. 8 c of the Reve-

nue Act; building and loan associations, taxed pursuant to Art. 8 d; pawn brokers, taxed under G. S. 105-50; installment paper dealers, licensed and taxed under G. S. 105-83; loan agencies or brokers, licensed and taxed under G. S. 105-88. Each of these varying kinds of businesses is defined by statute. Probably all make some loans identical in all respects with loans made by some other lending agency, but that fact does not make the businesses identical.

Installment paper dealers are defined by statute, G. S. 105-83, as "engaged in the business of dealing in, buying and or discounting installment paper, notes, bonds, contracts, evidences of debt and or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations." Those engaged in this business are by subsec. a of the statute required to pay an annual license tax of $100, and by subsec. b, to pay quarterly a tax equal to .275 of 1% of the face value of the obligations handled during such quarter.

The asserted invalidity of the statute is based on subsec. d, which reads: "This section shall not apply to corporations organized under the State or national banking laws." Although appellant has paid the taxes levied under subsecs. a and b, it does not claim that the tax levied under subsec. a is invalid. It limits its claim of invalidity to subsec. b. But if the statute is invalid because installment paper dealers and banks are in fact in the same class, the entire statute would fail, not merely subsec. b leaving in effect subsec. a which requires payment of $100 per year.

The business taxed under G. S. 105-83 is of comparatively recent origin. It came into existence primarily as a means to facilitate the sale of motor vehicles. We take judicial knowledge of the fact that there are many corporations engaged in this business. Some are financial giants and national in scope. Their shares are listed on various stock exchanges. Their resources run into hundreds of millions. They establish lines of credit and borrow from banks and insurance companies. They are created under statutes which authorize

the creation of business corporations in general. They do not have to secure a certificate of convenience and necessity to begin business. They do not receive deposits.

On the other hand, the statutory definition of a bank is "any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business." G. S. 53-1. Before a bank can be created, application must be made to the Commissioner of Banks who must determine the need for such an institution, fitness of the proposed incorporators to conduct the proposed business, and their ability to command the confidence of the community, G. S. 53-4. The powers which a bank may exercise are enumerated in G. S. 53-43. Their right to make investments and the kinds of investments which they may make are restricted, G. S. 53-46, 48. Banks must keep on hand or in approved depositories a fixed per cent of the monies on deposit, G. S. 53-50. They cannot establish branch offices without the approval of the Commissioner of Banks, G. S. 53-62. They are subject to regulations promulgated by the Commissioner of Banks, G. S. 53-104.

The foregoing are some of the things that distinguish a bank from an installment paper dealer. The distinction between banks and installment paper dealers is at least as great as the distinction between installment paper dealers and loan agencies or brokers, G. S. 105-88. The Legislature, in providing funds for governmental needs, had a right to recognize these distinctions. If perchance some banks are operating contrary to law and regulations promulgated by the Commissioner, that fact would not nullify a statute properly enacted by the Legislature.

Not long after the business defined by statute as installment paper dealers became economically important, several States, recognizing the distinction between such a business and the business of banking, taxed them differently. Where such statutes were challenged as arbitrary classifications, the courts upheld legislative action. *Dewey v. Richardson*, 92

N. E. 708; *Cowart v. Greenville*, 45 S. E. 122; *City Council v. Clark & Co.*, 52 S. E. 881; *Morris v. Lincoln*, 142 N. W. 114; *Link v. Commonwealth*, 265 S. W. 804; *Ormes v. Tenn. Finance Co.*, 269 S. W. 3; *Bradley & Co. v. Richmond*, 66 S. E. 872.

The facts stipulated, supplemented as they must be by matters of which we take judicial notice, support the conclusion reached by the trial court that plaintiff was not entitled to recover because of the asserted invalidity of the statute.

Affirmed.

APPENDIX C

Order on petition to rehear filed on July 7, 1961 and reads:

"Examined and denied this 7th July 1961. R. Hunt Parker and Carlisle W. Higgins, Associate Justices N. C. Supreme Court."